In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 344

CHARLES ORAN MENSIK AND MARY MENSIK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The present petition for certiorari is the culmination of petitioner's [1] attempts to secure review of a decision that the Tax Court rendered against him in 1963, the court of appeals affirmed in 1964, and this Court then declined to review. The sole question

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[1] For convenience, Charles Oran Mensik will be referred to as the petitioner. His wife, Mary Mensik, is a party only because a joint income tax return was filed for the year 1956.

properly before this Court at this time is whether the Tax Court correctly declined to have filed a motion for new trial based on allegedly newly discovered evidence that was sent to it two weeks after this Court's denial of certiorari.

That motion and the supporting documents were filed long after expiration of the period that the Tax Court's rules establish for seeking retrial. There was not compliance with the Tax Court's requirement that special leave be secured to file out of time.

The decision below was, therefore, correct. There is no conflict or other basis for review in this Court.

On February 10, 1964, the court of appeals affirmed the decision of the Tax Court entered February 21, 1963, 37 T.C. 703, which had determined that petitioner was liable for income tax deficiencies and fraud penalties for the year 1956. *Mensik* v. *Commissioner*, 328 F. 2d 147. On October 12, 1964, this Court denied certiorari, 379 U.S. 827. On October 16, 1964, petitioner filed a motion with the court of appeals to stay the mandate pending the filing of a petition for rehearing in this Court. In denying the motion, the court of appeals stated it was "without prejudice to petitioners to request a stay of mandate from the Supreme Court of the United States." Petitioner filed no petition for rehearing in this Court, nor did he request this Court to stay the mandate.

Then, on October 26, 1964, petitioner's counsel sent to the Tax Court two documents, one entitled "Motion for Retrial, Further Trial and/or Reconsidera-

tion" (R. 14-15, 101-104),[2] and the other entitled "Request for Place of Hearing". The Tax Court did not file those documents, but stamped them "lodged" and left them in the custody of the Clerk of the Tax Court (R. 15).

Petitioner took no further action until August 6, 1965, when his counsel delivered to the Tax Court two memoranda, each entitled "Memorandum in Support of Motion for Retrial, Further Trial and/or Reconsideration". One (R. 16-24) had numerous documents attached (R. 24-99). On August 10, 1965, the Clerk of the Tax Court acknowledged receipt of these memoranda, pointing out (R. 8) that the motion for retrial had not been filed but merely "lodged" since it had been delivered following this Court's denial of certiorari, and prior to the receipt on November 2, 1964, of the mandate of the court of appeals; and that since there was nothing pending before the Tax Court, the memoranda had been placed with the motion in the file of the case.

On March 2, 1966, the Tax Court received from taxpayer's counsel a "Request for Date of Hearing on Petitioners' Motion for Retrial, Further Trial and/or Reconsideration," which was neither lodged nor filed, but placed in the custody of the Clerk of the Tax Court (R. 15). On March 21, 1966, the Tax Court entered an order (R. 14-16), stating that the taxpayer's "Motion for Retrial, Further Trial and/or Reconsideration" had not been received until approxi-

[2] "R." references are to the Appendix to petitioner's brief in the court of appeals.

mately two years and nine months after the Tax Court's opinion had been served, and that there had been no request for special leave to file the motion out of time, as Rule 19(e) of the Tax Court's Rules of Practice requires. The Tax Court therefore concluded that no motion was before it, and directed the Clerk to return to petitioner's counsel all the documents, with attachments, that had been received on October 26, 1964, August 6, 1965, and on March 2, 1966.

On March 22, 1966, the Clerk of the Tax Court forwarded all these documents to petitioner's counsel. At the request of that counsel, the Clerk of the Tax Court, on July 22, 1966, sent the unopened package containing the documents to the court of appeals, explaining that they were not certified since they were not part of the record in the Tax Court (Appendix B to the Commissioner's brief in the Court of Appeals). On February 28, 1967, the Court of Appeals dismissed petitioner's petition for review (Pet. 1a).

Petitioner made no reasonable attempt to comply with the fair and orderly procedures the Tax Court provides litigants who seek new trials on the basis of newly discovered evidence. As the Tax Court pointed out (R. 14, 15-16), Rule 19 of its Rules of Practice forbade the filing of a motion for new trial on October 26, 1964, some 2 years and 9 months after its opinion had been served. Rule 19(a) provides that motions must be timely, and Rule 19(e) provides that no motion for retrial, further trial or reconsid-

eration may be filed more than 30 days after the opinion of the Tax Court has been served, except by special leave. The record shows that no special leave to file the motion for retrial was ever granted; petitioner's only mention of a request for leave was a parenthetical comment in the body of the motion itself. For these reasons the Tax Court justifiably refused to consider petitioner's motion.

This Court's Rule 58 does not, as petitioner seems to assume (Pet. 23), deal with the time allowed to seek new trials in the Tax Court—or in any other court of original jurisdiction. Nor does Section 7481 (2) (B) of the Internal Revenue Code of 1954, which states that a Tax Court decision that has been affirmed by a court of appeals becomes final when certiorari is denied, have anything to do with the time for filing a motion for a new trial in the Tax Court. The cases cited (Pet. 24) do not advance petitioner's position. *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225, rehearing denied, 321 U.S. 804, and *Helvering* v. *Northern Coal Co.*, 293 U.S. 191, ruled that predecessors of Section 7481 placed jurisdictional bounds on the power of this Court to grant rehearing of a denial of certiorari in a case originating in the Tax Court. *Lasky* v. *Commissioner*, 235 F. 2d 97 (C.A. 9), affirmed *per curiam*, 352 U.S. 1027, holds that the Tax Court had no jurisdiction to vacate a decision and grant a rehearing after its decision became final under a predecessor of Section 7481.[3]

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[3] The present petition for a writ of certiorari is directed—as were the affidavits and memoranda offered in support of

The petition for certiorari should be denied.

Respectfully submitted.

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petitioner's new trial motion (R. 24-99)—to one of the numerous factual issues that the Tax Court decided against petitioner in 1963. That issue was whether the Commissioner properly determined a $176,312.50 deficiency for 1956, based on the payment of that sum to the Melvin Building Corporation by the City Savings Association, of which petitioner was managing officer, president and chairman of the board. The documents that accompanied the motion contain no pertinent evidence that was not available to the taxpayer at the time of the trial. The Tax Court in the former proceeding carefully considered arguments similar to those now advanced before it decided the issue against petitioner. See *Mensik* v. *Commissioner*, 37 T.C. 703, 724-743. The question was fully briefed, argued, and decided against petitioner on the prior appeal, and was discussed extensively in the petition for certiorari and brief in opposition filed in this Court.

The jeopardy assessment of which petitioner complains (Pet. 11, 13, 21) was not properly before the Tax Court at the time of trial, and certainly has no relevance here. The existence of fraud, see 37 T.C. at 752-754, in any event made the case especially appropriate for jeopardy assessment, as the court below found in other proceedings. *Mensik* v. *Long*, 261 F. 2d 45, 47-48 (C.A. 7).

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